

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY 13 1999

PATRICK FISHER
Clerk

JIMMY DAVID HARDIN,

Petitioner - Appellant,
vs.

R. MICHAEL CODY, Warden;
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Respondents - Appellees.

No. 98-7064
(D.C. No. 95-CV-94-B)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **ANDERSON, KELLY, and BRISCOE**, Circuit Judges.**

Mr. Hardin, an inmate appearing pro se, appeals from the district court's dismissal of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The magistrate judge, whose findings and recommendations were

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

adopted by the district court, found that Mr. Hardin had failed to exhaust available state court remedies as required by § 2254(b). The district court also denied a certificate of appealability.

Raising the same issues he raised in the district court, Mr. Hardin argues that this court should grant a certificate of appealability because the state trial court impermissibly used two prior felony convictions to enhance the sentence which he is currently serving. Mr. Hardin was convicted and sentenced on May 15, 1992, and his direct appeal was dismissed by the Oklahoma Court of Criminal Appeals for failure to prosecute on May 3, 1994. He filed his federal habeas petition on March 1, 1995, and subsequently filed a post-conviction application for a direct appeal out of time with the state district court on May 6, 1996. This application was granted, and Mr. Hardin raised nine issues in his appeal. However, he failed to challenge the use of the prior convictions to enhance his sentence. His conviction and sentence were affirmed by the Court of Criminal Appeals on April 17, 1997. Mr. Hardin has yet to pursue state post-conviction remedies.

Given these facts, we agree with the recommendation of the magistrate, adopted by the district court, that Mr. Hardin's petition be dismissed without prejudice for failure to exhaust. See 28 U.S.C. § 2254(b). We DENY his request

for a certificate of appealability and DISMISS his appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge